

TABLE OF CONTENTS

I. REAL PARTY IN INTEREST	1
II. RELATED APPEALS AND INTERFERENCES	1
III. STATUS OF CLAIMS	2
IV. STATUS OF AMENDMENTS	2
V. SUMMARY OF CLAIMED SUBJECT MATTER	2
VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL	3
VII. ARGUMENT	5
VIII. CLAIMS APPENDIX	22
IX. EVIDENCE APPENDIX	25
X. RELATED PROCEEDINGS APPENDIX	26

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of	:	Customer Number: 46320
	:	
Bradford FISHER, et al.	:	Confirmation Number: 9674
	:	
Application No.: 10/672,777	:	Group Art Unit: 2143
	:	
Filed: September 26, 2003	:	Examiner: K. Belani
	:	
For: REAL-TIME SLA IMPACT ANALYSIS	:	

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This Appeal Brief is submitted in support of the Notice of Appeal filed January 3, 2008, wherein Appellants appeal from the Examiner's rejection of claims 1-11.

I. REAL PARTY IN INTEREST

This application is assigned to IBM Corporation by assignment recorded on September 26, 2003, at Reel 014561, Frame 0236.

II. RELATED APPEALS AND INTERFERENCES

Appellants are unaware of any related appeals and interferences.

III. STATUS OF CLAIMS

Claims 1-11 are pending and two-times rejected in this Application. It is from the multiple rejections of claims 1-11 that this Appeal is taken.

IV. STATUS OF AMENDMENTS

The claims have not been amended subsequent to the imposition of the Second and Final Office Action dated October 3, 2007 (hereinafter the Second Office Action).

V. SUMMARY OF CLAIMED SUBJECT MATTER

Referring to Figure 2 and also to independent claims 1 and 8, a method (and machine readable storage for performing the method) for performing a real-time service level agreement (SLA) impact analysis is disclosed. In blocks 210, 220, an event arising from a specific resource is detected (page 9, lines 5-7). In block 240, a determination is made, based upon the event, whether the specific resource cannot perform adequately to meet a term within an SLA which directly implicates the specific resource (page 9, lines 8-10). In block 290, a determination is made, based upon the event, whether the specific resource inhibits another resource from performing adequately to meet a term within the SLA which does not directly implicate the specific resource, but directly implicates the another resource (page 9, lines 12-16).

Referring to Figure 1 and also to independent claim 4, a system of performing a real-time service level agreement (SLA) impact analysis is disclosed. The system includes a service level manager 100, a relationship database 140, and a modeling and evaluation system 130. The service level manager 100 is programmed to establish a plurality of SLAs directly implicating selected resources 170 (page 7, lines 11-13). The relationship database 140 is

configured for coupling to a plurality of management applications 160 programmed to manage the selected resources 170 (page 7, lines 13-17). The modeling and evaluation system 130 is communicatively coupled to the relationship database 140 and the service level manager 100 and programmed to perform a real-time SLA impact analysis based both upon resources 190A directly implicated by the SLAs 150 and also upon resources 190B which are related to the resources 190A directly implicated by the SLAs 150 (page 8, line 15 through page 9, line 2).

Referring to Figure 2 and also to independent claim 11, a method for assessing the impact of an indirectly implicated resource within an service level agreement (SLA) in real time is disclosed. An SLA is established that directly implicating a performance level for an underlying resource (page 7, lines 12-13). At least one resource upon which the underlying resource depends is noted (page 8, lines 3-4). In block 210, an event arising from the at least one resource is received (page 9, lines 5-7). In block 290, determination is made whether the event affects the underlying resource in meeting the performance level (page 9, lines 12-15). Upon event preventing the underlying resource from meeting the performance level, in block 250, a notification is generated specifying an impact of the event upon the SLA (page 9, lines 15-16).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1. Claim 11 was rejected under 35 U.S.C. § 102 for anticipation based upon Bartz et al., U.S. Patent No. 6,701,342 (hereinafter Bartz);

2. Claims 1, 3, 8, and 10 were rejected under 35 U.S.C. § 103 for obviousness based upon Main et al., U.S. Patent No. 5,893,905 (hereinafter Main) in view of Bartz;

3. Claims 2 and 9 were rejected under 35 U.S.C. § 103 for obviousness based upon Main in view of Bartz and Barkan et al., U.S. Patent No. 6,925,493 (hereinafter Barkan)

4. Claim 4 was rejected under 35 U.S.C. § 103 for obviousness based upon Main in view of Barkan;

5. Claims 5 and 6 were rejected under 35 U.S.C. § 103 for obviousness based upon Main view of in view of Barkan and Dugan et al., U.S. Patent No. 2002/0083166; and

6. Claim 7 was rejected under 35 U.S.C. § 103 for obviousness based upon Main in view of Barkan and Bartz.

VII. ARGUMENT

As is evident from Appellants' previously-presented comments during prosecution of the present Application and from Appellants' comments below, there are questions as to how the limitations in the claims correspond to features in the applied prior art. In this regard, reference is made to M.P.E.P. § 1207.02, entitled "Contents of Examiner's Answer." Specifically, the following is stated:

(A) CONTENT REQUIREMENTS FOR EXAMINER'S ANSWER. The examiner's answer is required to include, under appropriate headings, in the order indicated, the following items:

...

(9)(c) For each rejection under 35 U.S.C. 102 or 103 where there are questions as to how limitations in the claims correspond to features in the prior art even after the examiner complies with the requirements of paragraphs (c) and (d) of this section, the examiner must compare at least one of the rejected claims feature by feature with the prior art relied on in the rejection. The comparison must align the language of the claim side-by-side with a reference to the specific page, line number, drawing reference number, and quotation from the prior art, as appropriate. (emphasis added)

Therefore, if the Examiner is to maintain the present rejections and intends to file an Examiner's Answer, the Examiner is required to include the aforementioned section in the Examiner's Answer.

Upon comparing the Examiner's statement of the rejection in the First Office Action dated May 24, 2007 (hereinafter the First Office Action) with the Examiner's statement of the rejection in the Second Office Action, with the exception of the "Response to Arguments" section found on pages 17-22 of the Second Office Action, Appellants have been unable to identify any substantive changes between the two Office Actions. Thus, specific portions of the First Office Action being referenced below have comparable portions within the Second Office Action.

THE REJECTION OF CLAIM 11 UNDER 35 U.S.C. § 102 FOR ANTICIPATION BASED UPON

BARTZ

For convenience of the Honorable Board in addressing the rejections, independent claim 11 stands or falls alone.

On pages 2 and 3 of the First Response dated August 21, 2007 (hereinafter the First Response), Appellants presented the following arguments. The factual determination of anticipation under 35 U.S.C. § 102 requires the identical disclosure, either explicitly or inherently, of each element of a claimed invention in a single reference.¹ Moreover, the anticipating prior art reference must describe the recited invention with sufficient clarity and detail to establish that the claimed limitations existed in the prior art and that such existence would be recognized by one having ordinary skill in the art.² As part of this analysis, the Examiner must (a) identify the elements of the claims, (b) determine the meaning of the elements in light of the specification and prosecution history, and (c) identify corresponding elements disclosed in the allegedly anticipating reference.³ This burden has not been met.

On page 3 of the First Office Action with regard to independent claim 1, the Examiner asserted the following:

establishing an SLA directly implicating a performance level for an underlying resource (Fig. 6, block titled SLO2, referencing the performance level for an underlying resource (for example server response time) to provide a response time less than or equal to 5 seconds; column 9, lines

¹ In re Rijckaert, 9 F.3d 1531, 28 USPQ2d 1955 (Fed. Cir. 1993); Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989); Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 894, 221 USPQ 669, 673 (Fed. Cir. 1984).

² See In re Spada, 911 F.2d 705, 708, 15 USPQ 1655, 1657 (Fed. Cir. 1990); Diversitech Corp. v. Century Steps, Inc., 850 F.2d 675, 678, 7 USPQ2d 1315, 1317 (Fed. Cir. 1988).

³ Lindermann Maschinenfabrik GMBH v. American Hoist & Derrick Co., 730 F.2d 1452, 221 USPQ 481 (Fed. Cir. 1984).

30-67 and column 10, lines 1-11 that describe SLO1 and SLO2 as well as their impact on the SLA). (emphasis added)

Appellants respectfully submit that "server response time" does not disclose an underlying resource. Server response time is a characteristic of a server, which can be considered an underlying resource. However, Bartz does not identify this particular underlying resource.

The Examiner's response to these arguments is found in the first full paragraph on page 18 of the Second Office Action, in which the Examiner asserted:

Applicants are directed to review the referenced lines (particularly column 9, lines 33-35) in Bartz et al. reference which states "response time associated with a particular resource of the managed service". The examiner's response to the argument that "*Bartz does not identify this particular underlying resource*", is that the rejected claim 11 does not identify any particular underlying resource either. (emphasis in original)

As already noted in the First Response, Appellants do not disagree that server response time is a characteristic of a server. However, the identification, by the Examiner, of a particular resource (as will be further discussed below) is important because claim 11 recites four separate limitations involving the "underlying resource." Since the Examiner cannot specifically identify where Bartz teaches the "underlying resource," the Examiner cannot establish that Bartz identically discloses each of the four separate limitations involving the "underlying resource," as claimed.

Appellants further presented the following arguments on page 3 of the First Response. On page 3 of the First Office Action with regard to independent claim 1, the Examiner asserted the following:

noting at least one resource upon which said underlying resource depends (resources affecting throughput).

Not only has the Examiner failed to specifically identify, within Bartz, the claimed feature that corresponds to the claimed underlying resource, the Examiner has failed to specifically identify, within Bartz, the features corresponding the claimed "at least one resource" upon which the underlying resource depends. Merely asserting that "resources affecting throughput" is insufficient to establish that Bartz identically discloses the limitations, as claimed.

The Examiner's response to these arguments is found in the last full paragraph on page 18 of the Second Office Action, in which the Examiner asserted:

[Appellants' arguments] is without any merit because the examiner has identified both an underlying resource (server response time) and at least one resource (data throughput) upon which said underlying resource depends (throughput of a resource such as a storage server will impact the response time of an underlying resource such as a web server). The disclosure (Fig. 6, SLO1 blocks 84 and 86; column 9, lines 30-67 and column 10, lines 1-11) in the Non-final Office Action of 5/24/2007 is sufficient to read on the claim language of claim 11, which does not specifically identify any resource either. (emphasis added)

Referring to the Examiner's cited passages, "columns 84 and 86 correspond to violation of the condition of SLO1" (column 9, lines 46-47 of Bartz). Moreover, despite the Examiner's assertion, the Examiner's cited passage of column 9, line 30 through column 10, line 11) is completely silent as to why SLO1 or SLO2 went into non-compliance. The underlined portion of the above-reproduced passage is a factually-unsupported inherency argument that does not meet the requirements for establishing that a particular feature is inherently (i.e., necessarily) disclosed by Bartz. Thus, Appellants maintain their argument that the Examiner has failed to establish that Bartz identically discloses this limitation.

On pages 3 and 4 of the First Response, Appellants further presented the following arguments. On page 3 of the First Office Action with regard to independent claim 1, the Examiner further asserted the following:

receiving an event arising from said at least one resource (Fig. 6, SLO1 blocks 84 and 86 that cause an event of throughput falling below 50kb/sec for 5 minutes; column 9, lines 30-67 and column 10, lines 1-11 that describe SLO1 and SLO2 as well as their impact on the SLA).

Throughput falling below 50kb/sec for 5 minutes does not correspond to the claimed "receiving an event." The throughput falling may be considered "experiencing an event," but the Examiner has not established that one having ordinary skill in the art would consider experiencing an event to identically disclose the claimed receiving an event. In this regard, Appellants note that the throughput falling is not "received" given the broadest reasonable interpretation of this term by one having ordinary skill in the art. Appellants also note that Fig. 6 of Bartz is silent as to a resource (i.e., the event arises from the claimed at least one resource).

The Examiner's response to these arguments is found in the first full paragraph on page 19 of the Second Office Action, in which the Examiner asserted:

[Appellants' arguments] is also without any merit. To a computer program (used for analyzing SLA compliance), there is no "experiencing an event". The event may be generated by interrupts from timer routines when such routines detect a violation of an SLO, or from software code checking traffic on a network node.

Notwithstanding whether or not one having ordinary skill in the art would consider the cited passages of Bartz comparable to "experiencing an event," the Examiner has failed to establish that the event was received, as claimed. Moreover, the Examiner's response is completely silent as to Appellants' argument that Fig. 6 of Bartz is silent as to a resource (i.e., the event arises from the claimed at least one resource). As already noted above, the Examiner's cited passages are silent as to the underlying resource and the at least one resource upon which the underlying resource depends. As such, the Examiner cannot specifically identify "an event arising from said

at least one resource" when the Examiner's analysis fails to establish that Bartz teachings the "at least one resource."

**THE REJECTION OF CLAIMS 1, 3, 8, AND 10 UNDER 35 U.S.C. § 103 FOR OBVIOUSNESS
BASED UPON MAIN IN VIEW OF BARTZ**

For convenience of the Honorable Board in addressing the rejections, claims 3, 8, and 10 stand or fall together with independent claim 1.

Claim 1

On pages 4 and 5 of the First Response, Appellants presented the following arguments. On page 5 of the First Office Action with regard to independent claim 1, the Examiner asserted the following:

detecting an event arising from a specific resource (Fig. 5, blocks 510, 512, 514, 516, 518, and 520 that disclose three different scenarios that trigger events arising out of failure of specific resources to meet SLA criteria; column 7, lines 37-40 that detail some of the causes that trigger events).

Upon reviewing the Examiner's cited passages in Main, Appellants note the teaching of an "event." However, Appellants are entirely clear as to what "specific resource" does the event arise from. In this regard, Appellants note that the Examiner has failed to properly characterize the teachings of Main.

The Examiner's response to these arguments is found in the paragraph spanning pages 19 and 20 of the Second Office Action, in which the Examiner asserted:

[Appellants' arguments] is also without merit, as the cited reference lists 'This includes ABENDs, user termination, system termination, and completion with error codes.' ABENDs (ABnormal END of a job submitted on an IBM MVS Operating System) are generally caused by jobs exhausting their allocated resources such as CPU execution time, allocated memory region size, allocated secondary storage, etc. These are examples of specific resources that may trigger events.

1
2 Again, the Examiner's analysis is predicated upon a factually-unsupported inherency argument.
3 Not only is the underlined portion of the above-reproduced passage not found within the
4 teachings of Main, even if these teachings were included in Main, such teachings do not establish
5 that Main inherently teaches the limitations for which Main is being relied upon to teach. The
6 fact that a job is delayed, perhaps due to repeated ABENDs and restarts (see column 2, lines 27-
7 28 of Main) does not necessarily require that an event arising from a specific resource is detected
8 and identified.

9
10 Claim 1 recites five separate instances of the "specific resource." Without knowledge of
11 the identity of the specific resource, the Examiner cannot establish that that the combination of
12 applied prior art teaches these additional limitations associated with the "specific resource."

13
14
15 On page 5 of the First Response, Appellants presented the following arguments. On page
16 5 of the First Office Action with regard to independent claim 1, the Examiner further asserted the
17 following:

18 determining whether based upon said event said specific resource cannot perform adequately to
19 meet a term within an SLA which directly implicates said specific resource (column 8, lines 55-67
20 and column 9, lines 1-10 that disclose the details of the three failing scenarios mentioned above).
21
22 Again, the Examiner's cited passage does not refer to a specific resource. As such, the Examiner
23 cannot properly assert that Main identically discloses "determining whether based upon said
24 event said specific resource cannot perform adequately ... " when Main does not disclose the
25 specific resource.

The Examiner's response to these arguments is found in the first full paragraph on page 20 of the Second Office Action, in which the Examiner asserted:

[Appellants' arguments] is also not persuasive, because the claim language does not refer to any specific resource either. The Main et al. reference, in view of Bartz et al. adequately reads on the claim language for claims 1, 3, Band 10, which remain rejected. (underlined added, bolded removed)

The Examiner's assertion that "the claim language does not refer to any specific resource either" in the above reproduced passage (and elsewhere throughout the "Response to Arguments" section of the Second Office Action) and the implied assertion that the Examiner is not required to identify the specific resource evidences a clear misunderstanding, by the Examiner, of a fundamental rule of claim interpretation.

Consider the following hypothetical claim:

A widget comprising:

a specific resource attached to A, wherein
the specific resource is attached to B,
the specific resource is attached to C, and
the specific resource is attached to D.

Based upon this hypothetical claim, one cannot identify four separate resources, each of which are respectively attached to A, B, C, and D, and then assert that this identification identically disclose this claim. By referring to "the specific resource ...", the limitation refers back to the initial recitation of "a specific resource." Thus, when this claim is properly interpreted, each recitation of "the specific resource" refers back to the initial recitation of "a specific resource," and thus only a single "specific resource" is being claimed, and this single specific resource is attached to A, B, C, and D.

1 By not specifically identifying each of the four instances of "said specific resource" and
2 the instance of "a specific resource," the Examiner cannot establish that each of the four alleged
3 teachings of "said specific resource" are identical to the alleged initial teaching of "a specific
4 resource."

5
6
7 On pages 5 and 6 of the First Response, Appellants presented the following arguments.
8 On pages 5 and 6 of the First Office Action, the Examiner relied upon Bartz to teach the claimed
9 "determining whether based upon said event said specific resource inhibits another resource from
10 performing adequately to meet a term within said SLA which does not directly implicate said
11 specific resource, but directly implicates said another resource." In this regard, Appellants note
12 that the Examiner employed similar analysis as to characterizing the teachings of Bartz when
13 characterizing the teaching of Bartz in the rejection of claim 11 under 35 U.S.C. § 102. As
14 already argued above by Appellants in response to this rejection, Bartz is silent as to the
15 particular resource. Moreover, Bartz is also silent as to what specific resource is inhibited by the
16 event and the determination of the same.

17
18 Therefore, even if Main was modified in view of Bartz, the claimed invention would not
19 result, since neither Main nor Bartz teach all of the limitations for which Main and Bartz are
20 being relied upon to teach.

21
22 The Examiner did not separately address these arguments in the Second Office Action.
23

THE REJECTION OF CLAIMS 2 AND 9 UNDER 35 U.S.C. § 103 FOR OBVIOUSNESS BASED UPON MAIN IN VIEW OF BARTZ AND BARKAN

For convenience of the Honorable Board in addressing the rejections, claims 2 and 9 stand or fall together with independent claim 1.

Claims 2 and 9 depend ultimately from independent claims 1 and 8, and Appellants incorporate herein the arguments previously advanced in traversing the imposed rejection of claims 1 and 8 under 35 U.S.C. § 103 for obviousness based upon Main and Bartz. The Examiner's tertiary reference to Barkan does not cure the argued deficiencies of the combination of Main and Bartz. Accordingly, even if one having ordinary skill in the art were impelled to combine the applied prior art, the claimed invention would not result. Appellants, therefore, respectfully submit that the imposed rejection of claims 2 and 9 under 35 U.S.C. § 103 for obviousness based upon Main in view of Bartz and Barkan is not viable.

THE REJECTION OF CLAIM 4 UNDER 35 U.S.C. § 103 FOR OBVIOUSNESS BASED UPON MAIN IN VIEW OF BARKAN

For convenience of the Honorable Board in addressing the rejections, claim 4 stands or falls alone.

On page 7 of the First Response, Appellants presented the following arguments. On page 13 of the First Office Action with regard to independent claim 4, the Examiner asserted the following:

In the same field of endeavor, Barkan et al. clearly show and disclose a system with a service level manager programmed to establish a plurality of SLAs directly implicating selected

resources (Fig. 2, SLA Manager block 33, SLA DB block 32, and SLA Engine block 31; column 5, lines 21-34 that describe the function of each of these blocks)

A review of column 5, lines 21-34 does not support the Examiner's assertion that Barkan discloses the claimed service level manager. The SLA Database 32 described by Barkan "contains SLA definitions that target the amount of service level promised to a customer." Absent from the teachings in Barkan as to either the SLA Manager 33 or the SLA Database 32 is a description of "a plurality of SLAs directly implicating selected resources," as claimed.

The Examiner's response to these arguments is found in the paragraph spanning pages 20 and 21 of the Second Office Action, in which the Examiner asserted:

SLA definitions in the SLA Database disclose multiple SLA, and the previous discussions detail how selected resources (CPU execution time, allocated memory region size, allocated secondary storage, etc.) are implicated in SLA compliance determination. (emphasis in original)

Despite the Examiner's assertions, Appellants are still unclear as to where Barkan teaches the claimed "a plurality of SLAs directly implicating selected resources." SLA definitions are not comparable to service level agreements. A SLA definition may be a part of a service level agreement, but unless specifically disclosed, a SLA definition does not identically disclose a service level agreement. Moreover, the Examiner's reference to "selected resources" are yet again another factually unsupported inherency argument. Specifically, the Examiner has failed to establish that a SLA definition necessarily (i.e., inherently) directly implicates selected resources, as claimed.

On pages 7 and 8 of the First Response, Appellants presented the following arguments. On page 13 of the First Office Action with regard to independent claim 4, the Examiner further asserted the following:

1 a relationship database configured for coupling to a plurality of management applications
2 programmed to manage said selected resources (Fig. 3, Infrastructure DB and Fig.2, Infrastructure
3 Manager block 24; column 6, lines 25-31 which disclose that the Infrastructure Manager stores the
4 information about the map of resources, i.e. what is the role of each resource, where it is
5 connected, and which applications are influenced by it, in the Infrastructure DB).
6

7 Referring to column 6, lines 24-31, Barkan does not teach that the Infrastructure Manager 24 is
8 "a plurality of management applications programmed to manage said selected resources."
9 Instead, the Infrastructure Manager 24 is described a "component ... responsible for holding
10 information about [the] map of resources."
11

12 The Examiner's response to these arguments is found in the first full paragraph on page
13 21 of the Second Office Action, in which the Examiner asserted:

14 the Infrastructure Manager 24 can be made up of more than one management applications to find
15 the resources that should be monitored for each customer, to ascertain the role of each resource, to
16 determine where it is connected, and which users are influenced by it. The examiner considers all
17 these functions necessary to manage said selected resources.
18

19 Despite the inherency argument that "[t]he examiner considers all these functions necessary to
20 manage said selected resources," the Examiner has failed to establish where this inherency
21 argument is factually supported by the applied prior art.
22

23
24 On page 8 of the First Response, Appellants presented the following arguments. On page
25 13 of the First Office Action with regard to independent claim 4, the Examiner further asserted
26 the following:

27 a modeling and evaluation system communicatively coupled to said relationship database and said
28 service level manager and programmed to perform a real-time SLA impact analysis based both
29 upon resources directly implicated by said SLAs and also upon resources which are related to said
30 resources directly implicated by said SLAs (Fig. 2, SLA Engine block 31 and CSL Engine block
31 28 together functioning as a modeling and evaluation system, communicatively coupled to said
32 relationship database Infrastructure DB via Infrastructure Manager 24 and SLA Manager 33;
33 column 5, lines 21-36 and column 6, lines 25-31 that disclose the details of these blocks).
34

Although the Examiner asserts that the SLA Engine 31 and the CSL Engine 28 "together [function] as a modeling and evaluation system," Appellants respectfully disagree. The SLA Engine 31 is described in column 5, lines 31-34 as a component responsible for processing data and generating maps of a promised service level for a customer, and the CSL Engine 28 is described in column 5, lines 35-41 as a component for processing the measurement and events being reported. Absent from these teachings, however, is a discussion that these components of Barkan perform "modeling," as claimed.

The Examiner's response to these arguments is found in the paragraph spanning pages 21 and 22 of the Second Office Action, in which the Examiner asserted:

[Appellants' arguments] is also without merit, because the SLA engine generates maps (detailed representations) of the promised service level for a customer. One way the maps can be generated is by modeling the promised service level agreement. (emphasis added)

Yet again, the Examiner presents a factually unsupported inherency argument. The mere fact that a certain thing may result from a given set of circumstances is not sufficient to establish inherency.⁴ To establish inherency, the extrinsic evidence must make clear that the missing element must necessarily be present in the thing described in the reference, and that the necessity of the feature's presence would be so recognized by persons of ordinary skill.⁵ This burden, however, has not been met. As admitted by the Examiner, use of a model is just "[o]ne way the maps can be generated." Therefore, since the map can be generated other ways, the missing element is not inherently disclosed.

⁴ In re Rijckaert, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993) (reversed rejection because inherency was based on what would result due to optimization of conditions, not what was necessarily present in the prior art); In re Oelrich, 666 F.2d 578, 581-82, 212 USPQ 323, 326 (CCPA 1981).

⁵ Finnegan Corp. v. ITC, 180 F.3d 1354, 51 USPQ2d 1001 (Fed. Cir. 1999); In re Robertson, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999); Continental Can Co. USA v. Monsanto Co., 20 USPQ 2d 1746 (Fed. Cir. 1991); Ex parte Levy, 17 USPQ2d 1461 (BPAI 1990).

On page 8 of the First Response, Appellants presented the following arguments. Also absent from the Examiner's analysis is a clear identification of where Barkan teaches that these components "perform a real-time SLA impact analysis based both upon resources directly implicated by said SLAs and also upon resources which are related to said resources directly implicated by said SLAs." In this regard, Appellants note that the Examiner has not specifically identified, within Barkan, the "resources directly implicated" and the "resources which are related to said resources directly implicated."

The Examiner's response to these arguments is found in the first full paragraph on page 22 of the Second Office Action, in which the Examiner asserted:

The applicants are directed to column 7, item 6 (lines 18-26) in the Barkan et al. reference that disclose an SLA section about "Help desk". The directly implicated helpdesk personnel are needed for "Success of helpdesk sessions", whereas resources which are related (such as computer and communication hardware and software resources) to said resources directly implicated, are needed for "Response time of handling level 1 trouble tickets" and "Response time of handling level 2 trouble tickets"; availability of both types of resources determining SLA compliance.

Notwithstanding the Examiner's identification of helpdesk personal as comparable to the claimed "resources directly implicated by said SLAs" and computer/communication hardware/software as "resources which are related to said resources directly implicated by said SLAs," Appellants are unclear as to how a modeling and evaluation system performs a real-time SLA impact analysis using these directly implicated and related to resources. Producing group summaries, as taught by Barkan, is not comparable to performing "real-time SLA impact analysis," as claimed.

THE REJECTION OF CLAIMS 5 AND 6 UNDER 35 U.S.C. § 103 FOR OBVIOUSNESS BASED UPON MAIN IN VIEW OF BARKAN AND DUGAN

For convenience of the Honorable Board in addressing the rejections, claims 4 and 5

stand or fall together with independent claim 4.

Claims 5 and 6 depend ultimately from independent claim 4, and Appellants incorporate herein the arguments previously advanced in traversing the imposed rejection of claim 4 under 35 U.S.C. § 103 for obviousness based upon Main and Barkan. The Examiner's tertiary reference to Dugan does not cure the argued deficiencies of the combination of Main and Barkan. Accordingly, even if one having ordinary skill in the art were impelled to combine the applied prior art, the claimed invention would not result. Appellants, therefore, respectfully submit that the imposed rejection of claims 5 and 6 under 35 U.S.C. § 103 for obviousness based upon Main in view of Barkan and Dugan is not viable.

**THE REJECTION OF CLAIM 7 UNDER 35 U.S.C. § 103 FOR OBVIOUSNESS BASED UPON
MAIN IN VIEW OF BARKAN AND BARTZ**

For convenience of the Honorable Board in addressing the rejections, claim 7 stands or falls together with independent claim 4.

Claim 7 depends ultimately from independent claim 4, and Appellants incorporate herein the arguments previously advanced in traversing the imposed rejection of claim 4 under 35 U.S.C. § 103 for obviousness based upon Main and Barkan. The Examiner's tertiary reference to Bartz does not cure the argued deficiencies of the combination of Main and Barkan. Accordingly, even if one having ordinary skill in the art were impelled to combine the applied prior art, the claimed invention would not result. Appellants, therefore, respectfully submit that the imposed rejection of claim 4 under 35 U.S.C. § 103 for obviousness based upon Main in view of Barkan and Bartz is not

viable.

Conclusion

Based upon the foregoing, Appellants respectfully submit that the Examiner's rejections under 35 U.S.C. §§ 102, 103 based upon the applied prior art is not viable. Appellants, therefore, respectfully solicit the Honorable Board to reverse the Examiner's rejections under 35 U.S.C. §§ 102, 103.

To the extent necessary, a petition for an extension of time under 37 C.F.R. § 1.136 is hereby made. Please charge any shortage in fees due under 37 C.F.R. §§ 1.17, 41.20, and in connection with the filing of this paper, including extension of time fees, to Deposit Account 09-0461, and please credit any excess fees to such deposit account.

Date: March 3, 2008

Respectfully submitted,

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CUSTOMER NUMBER 46320

VIII. CLAIMS APPENDIX

1. A method for performing a real-time service level agreement (SLA) impact analysis, the method comprising the steps of:

detecting an event arising from a specific resource;

determining whether based upon said event said specific resource cannot perform adequately to meet a term within an SLA which directly implicates said specific resource; and,

further determining whether based upon said event said specific resource inhibits another resource from performing adequately to meet a term within said SLA which does not directly implicate said specific resource, but directly implicates said another resource.

2. The method of claim 1, further comprising the step of establishing a hierarchy of resources within a shared database through which a relationship can be recognized between said specific resource and said another resource in said further determining step.

3. The method of claim 1, wherein said detecting event comprises the step of receiving an event from a management application charged with managing said specific resource.

4. A system of performing a real-time service level agreement (SLA) impact analysis comprising:

a service level manager programmed to establish a plurality of SLAs directly implicating selected resources;

a relationship database configured for coupling to a plurality of management applications programmed to manage said selected resources; and,

a modeling and evaluation system communicatively coupled to said relationship database and said service level manager and programmed to perform a real-time SLA impact analysis based both upon resources directly implicated by said SLAs and also upon resources which are related to said resources directly implicated by said SLAs.

5. The system of claim 4, further comprising a hierarchy of dependencies between said selected resources.

6. The system of claim 5, further comprising a data warehouse coupled to said relationship database and configured to store said hierarchy.

7. The system of claim 4, wherein said modeling and evaluation system is disposed within said service level manager.

8. A machine readable storage having stored thereon a computer program for performing a real-time service level agreement (SLA) impact analysis, the computer program comprising a routine set of instructions for causing the machine to perform the steps of:

detecting an event arising from a specific resource;

determining whether based upon said event said specific resource cannot perform adequately to meet a term within an SLA which directly implicates said specific resource; and,

further determining whether based upon said event said specific resource inhibits another resource from performing adequately to meet a term within said SLA which does not directly implicate said specific resource, but directly implicates said another resource.

9. The machine readable storage of claim 8, further comprising the step of establishing a hierarchy of resources within a shared database through which a relationship can be recognized between said specific resource and said another resource in said further determining step.

10. The machine readable storage of claim 8, wherein said detecting event comprises the step of receiving an event from a management application charged with managing said specific resource.

11. A method for assessing the impact of an indirectly implicated resource within an service level agreement (SLA) in real time, the method comprising the steps of:

- establishing an SLA directly implicating a performance level for an underlying resource;
- noting at least one resource upon which said underlying resource depends;
- receiving an event arising from said at least one resource;
- determining whether said event affects said underlying resource in meeting said performance level; and,
- if said event prevents said underlying resource from meeting said performance level, generating a notification specifying an impact of said event upon said SLA.

IX. EVIDENCE APPENDIX

No evidence submitted pursuant to 37 C.F.R. §§ 1.130, 1.131, or 1.132 of this title or of any other evidence entered by the Examiner has been relied upon by Appellants in this Appeal, and thus no evidence is attached hereto.

X. RELATED PROCEEDINGS APPENDIX

Since Appellants are unaware of any related appeals and interferences, no decision rendered by a court or the Board is attached hereto.